

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re	)	
	)	
Application of Consent for Assignment of	)	
Fifty Broadband Personal Communication	)	
Services Licenses	)	
	)	
Filed by	)	WT Dkt. No. 03-19
	)	
NORTHCOAST COMMUNICATIONS,	)	DA-03-172
LLC	)	
	)	File Nos. 0001138904, 0001138905,
	)	0001138909 (lead application)
And	)	
	)	
	)	
CELLCO PARTNERSHIP d/b/a	)	
VERIZON WIRELESS	)	

To: The Commission

**PETITION TO DENY OF NATIONAL ENGINEERING TECHNICAL COMPANY**

National Engineering Technical Company (“NETCO”) hereby petitions the Federal Communications Commission (“Commission”) to deny the above-referenced application for consent to assign the licenses of Northcoast Communications, LLC (“Northcoast”) and its license subsidiaries, Boston Holding, LLC and New York PCS Holding, LLC, to Cellco Partnership (“Cellco”) d/b/a Verizon Wireless.

As shown below, the proposed assignment is not in the public interest and should be denied. Northcoast and its agents failed to perform certain contractual obligations to NETCO. As a direct and proximate result of Northcoast’s actions and inactions, Northcoast has materially breached the terms of an agreement with NETCO for constructing improvements to Northcoast’s

wireless communications services in markets Northcoast owns or leases throughout Ohio and the Midwest United States. Furthermore, notwithstanding NETCO's repeated demands for payment, Northcoast has materially breached its contractual obligations by unilaterally refusing to compensate NETCO for an undisputed sum due and owing NETCO. As a direct and proximate result of Northcoast's refusal to compensate NETCO for earned contract sums, NETCO has been damaged in an amount not less than \$600,439.70, exclusive of prejudgment interest, attorneys' fees and costs.

Therefore, NETCO, by its undersigned attorneys, respectfully requests that the Commission deny approval for the assignment to Cellco of fifty (50) Personal Communications Services ("PCS") licenses on the grounds that Northcoast's breach of contract raises public interest questions that bear on the above-captioned application. In the alternative, NETCO respectfully requests that the Commission defer action on the above-captioned application pending the outcome of the breach of contract suit presently pending in the Court of Common Pleas of Cuyahoga County, Ohio (Case No. CV 03493090) (the "Ohio Court Proceeding").

## **I. BACKGROUND**

### **A. Proposed Transaction**

Northcoast and its license subsidiaries, Boston Holdings, LLC and New York PCS Holdings, LLC, and Cellco d/b/a Verizon Wireless, have filed applications pursuant to Section 310(d) of the Communications Act of 1934, as amended,<sup>1</sup> seeking Commission approval for the assignment to Cellco of fifty (50) PCS licenses. The following three applications for consent to assign PCS licenses granted pursuant to Part 24 of the Commission's rules have been assigned for the following file numbers: (i) File No. 0001138904 (for Licensee New York PCS Holdings, LLC, Call Sign (Lead) KNLH264); (ii) File No. 0001138905 (for Licensee Boston Holding,

LLC, Call Sign (Lead) KNLH242); and (iii) File No. 0001138909 (for Licensee Northcoast Communications, LLC, Call Sign (Lead) KNLH265). The Commission has acknowledged that File No. 001138909 has been designated as the lead application in this transaction.<sup>2</sup>

The assignment and transfer of the control applications referenced herein have been found, upon initial review, to be acceptable by the Commission for filing.<sup>3</sup> Interested parties are permitted to file comments or petitions to deny no later than February 20, 2003.<sup>4</sup> NETCO has timely filed this Petition to Deny to alert the Commission to certain practices by Northcoast in its dealings with the public that should be considered by the Commission in processing the subject application.

#### **B. The NETCO/Northcoast Contract**

On or about October 2, 2000, NETCO entered into a written contract with Northcoast (the “Agreement”) pursuant to Northcoast’s 1999 building plan to construct various electrical improvements for both new and existing communications towers operated and leased by Northcoast that would upgrade and expand Northcoast’s licenses and related network assets for wireless communication services throughout Ohio and the Midwest (the “Project”). The Agreement sets forth general terms and conditions (collectively, the “Terms”) related to the performance of NETCO’s work for Northcoast for the Project. Pursuant to the Terms, Northcoast agreed to issue Contract Documents on a site-by-site basis, including drawings, specifications, lease agreements, schedule of values, scope of work, time schedules and Northcoast’s Master Construction Specification book.

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<sup>1</sup> 47 U.S.C. § 310(d).

<sup>2</sup> The Commission’s Public Notice respecting this matter, released January 21, 2003.

<sup>3</sup> See the Commission’s Public Notice respecting this matter, released January 21, 2003.

<sup>4</sup> *Id.*

The Agreement requires that Northcoast pay NETCO no later than sixty (60) days after the Owner's Representative agrees with the amount invoiced by NETCO and the Owner approves payment on a site-by-site basis. Northcoast further agreed to pay NETCO a 20% retainage on a site-by-site basis upon completion of all punchlist items; submission of all appropriate governmental approvals and inspections; waiver of lien releases; subcontractor proof of payment; original copies of any warranties; and sign-off by Owner's Representative. NETCO agreed to pay each subcontractor and material supplier upon receipt of payment from Northcoast.

NETCO has fully performed and properly completed all of the communications work Northcoast directed NETCO to perform and approved upon completion, including by way of example, installing Northcoast's first system monopole, installing temporary cell sites and generators and BTS installations for the benefit of Northcoast's expansion of its licenses and related network assets for wireless communication services throughout Ohio and the Midwest.

Without notice to NETCO and without any basis to offset or assert any recoupment against the outstanding invoices owed by Northcoast, and without legal excuse, Northcoast abruptly stopped paying NETCO's invoices for work properly performed and approved by Northcoast pursuant to the written Agreement between the parties. NETCO has invoiced Northcoast for all of the work NETCO properly performed at the direction and approval of Northcoast. NETCO has made repeated demands to Northcoast for payment of the outstanding balance due in the total amount of \$600,439.70 or, in the alternative, that Northcoast agree to a firm payment schedule.

Notwithstanding NETCO's repeated demands, Northcoast has failed to propose a firm payment schedule or fully compensate NETCO and there remains an outstanding balance due

and owing to NETCO in the total amount of \$600,439.70. Consequently, NETCO instituted the Ohio Court Proceeding.

## **II. THE PROPOSED ASSIGNMENT IS NOT IN THE PUBLIC INTEREST AND SHOULD BE DENIED, OR IN THE ALTERNATIVE, DEFERRED**

### **A. NETCO Represents a Factor Representing the Public Interest**

NETCO acknowledges that the Ohio Court of Common Pleas, not the Commission, has jurisdiction to decide the private rights of NETCO and Northcoast. However, (i) the Commission retains ultimate jurisdiction over the subject PCS licenses and (ii) NETCO's position in the private litigation does not remove NETCO from a position of standing also under the Communications Act to challenge action under it adverse to NETCO's interests. Northcoast's failure to fully compensate NETCO for work properly performed for the benefit of Northcoast's expansion of its wireless communication services in Ohio and throughout the Midwest is relevant to the Commission's determination whether the public interest would be served by grant of the assignment and transfer of the control applications referenced herein. Good faith and fair dealing bear upon the public interest. *Granik v. Federal Communications Commission*, 234 F.2d 682, 684 (DC Cir. 1956). NETCO is the person to present its facts to the Commission. Thus, through its private interest, NETCO represents a factor affecting the public interest, even though its private interest alone is not for Commission determination. *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470, 477; *Scripps-Howard Radio, Inc., v. Federal Communications Commission*, 316 U.S. 4, 14; *United States v. Storer Broadcasting Co.*, 76 S.Ct. 763.

**B. Northcoast's Breach of Contract Requires Denial of the Above-Referenced Application**

While Northcoast's refusal to fully compensate NETCO for work properly performed is not technically broadcast-related, NETCO asserts that such an act is rife with moral turpitude and bodes ill will for Northcoast's reliability in its dealings with the public and other governmental agencies such as this Commission. *Compare United Broadcasting Co., Inc.*, 94 FCC 2d 938, 953-55 (Rev.Bd. 1983) (bribery of government official involves moral turpitude and is cognizable in comparative broadcast proceeding), *with Granik*, 234 F.2d at 684 ("Good faith and fair dealing bear upon the public interest" and should be considered in the Commission's licensing processes). The Commission's entire scheme of regulation is premised on the Commission's ability to depend on the accuracy and truthfulness of its licensees' and prospective licensees' representations to it. Accordingly, the Commission must be alert to the implications of deceptive practices by applicants in their dealings with the public and other tribunals. Inasmuch as the Commission cannot depend on the accuracy and truthfulness of Northcoast's representations, the above-referenced application should be denied.

**C. In the Alternative, Action on the Above-Captioned Application Should be Deferred Pending the Outcome of the Ohio Court Proceeding.**

In the alternative, NETCO respectfully urges the Commission to defer any action on the assignment and transfer of the control applications referenced herein until the outcome of the Ohio Court Proceeding. NETCO respectfully submits that the breach of contract by Northcoast so adversely reflects on Northcoast's character qualification as to require, at a minimum, a deferral of action on the subject application until disposition of the Ohio Court Proceeding, or until Northcoast satisfies its debt to NETCO, whichever occurs first.

### III. CONCLUSION

Wherefore, in view of the foregoing, NETCO respectfully requests that the Commission deny the above-referenced application, or in the alternative, defer action thereon pending resolution of the Ohio Court Proceeding.

Respectfully submitted,

/s/ Mark E. Avsec

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